Filed 3/28/19 P. v. Ordonezmartinez CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ROBERTO ORDONEZMARTINEZ, Defendant and Appellant.	B290684 (Los Angeles County Super. Ct. No. BA453295)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura F. Priver, Judge. Affirmed and remanded for resentencing.

Benjamin Owens, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Roberto Ordonezmartinez of one count of oral copulation with a child 10 years old or younger and two counts of lewd act upon a child. On appeal, defendant argues that the court erred in instructing the jury that the "[c]onviction of a sexual assault crime may be based on the testimony of a complaining witness alone." Our Supreme Court has approved this instruction (*People v. Gammage* (1992) 2 Cal.4th 693 (*Gammage*)), and this court is required to follow the Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (*Auto Equity Sales*).)

Defendant also challenges the trial court's imposition of consecutive sentences on both counts of lewd act upon a child. The trial court erred in concluding that consecutive sentences were mandatory, and the case must be remanded to allow the trial court to exercise that sentencing discretion. In all other respects, the judgment is affirmed.

BACKGROUND

Defendant is married to Ana Munos. Ana has two sisters. The victims are the children of Munos's sisters, defendant's nephew, R. and niece, A.

1. *Victim R.*

When R. was six years old, he and his family visited defendant at defendant's home. Defendant orally copulated R. R. testified that defendant ate his penis "like noodles."

Immediately after the incident, R. told his mother that defendant kissed his penis. Shortly after the incident, R. told a police officer that defendant kissed his mouth and orally

copulated him.[1] R. also told a nurse that defendant kissed R.'s mouth.

Shortly after the incident with defendant, a forensic interviewer spoke to R. R. told her that defendant took R. to defendant's room and pulled down R.'s pants and underwear. R. said that defendant was "chupping" his penis, and later testimony indicated that "chupping" meant "sucking." R. also reported that defendant kissed him.

Also shortly after the incident, a nurse observed that R. had small ruptures in the blood vessels on his penis. That injury is consistent with oral copulation.

A nurse swabbed R., and DNA analysis later revealed defendant's DNA was on R.'s penis, scrotum, and inner thigh. The DNA profile from the penile, scrotal, and inner thigh swabs occurs in 1 in 9 quintillion (9 followed by 18 zeros) unrelated individuals.

2. *Victim A.*

A. testified that when she was 11 years old, she attended a party at her grandfather's house that defendant also attended.[2] Defendant sat down next to her and touched her leg and inner thigh. A. was wearing leggings. Defendant did not touch A.'s vagina, but he moved his hand close to her vagina. A. told her mother, but her mother did not want to report the incident to police.

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[1] R. testified at trial that defendant did not kiss him.

[2] A. was 17 years old at the time of trial.

3. *Defendant's Convictions and Sentence*

Jurors convicted defendant of oral copulation of a child age 10 years or younger in violation of Penal Code[3] section 288.7, subdivision (a). Jurors found defendant guilty of two counts of lewd act upon a child in violation of section 288, subdivision (a). R. was the victim of the first count, and A. was the victim of the second. With respect to all counts, jurors found a multiple victim enhancement true.

For the lewd act on R., the trial court sentenced defendant to prison for 15 years to life. For the lewd act on A., the trial court sentenced defendant to a consecutive 15-year-to life prison term. The trial court indicated that it believed the consecutive sentences were mandatory. The trial court stated that it would "choose to sentence the defendant consecutively on count 3 due to the fact it was a separate victim." The trial court sentenced defendant to a concurrent 15 year-to-life sentence for the oral copulation of R.

DISCUSSION

1. Defendant Demonstrates No Instructional Error

The trial court instructed jurors with both CALCRIM No. 301 and CALCRIM No. 1190. The former provides: "The testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence." CALCRIM No. 1190 provides: "Conviction of a sexual assault crime may be based on the testimony of a complaining witness alone."

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[3] All statutory references are to the Penal Code.

Defendant argues that the combination of instructions signaled to jurors that "the victims' testimony did not need to be treated with the same caution as other evidence." Defendant further argues that CALCRIM No. 1190 diminished the prosecution's burden of proof by instructing jurors that the victims' testimony did not need to be "scrutinized as closely" as other evidence. Although defendant did not raise these arguments in the trial court, we consider his argument on appeal because it affects his substantial rights. (§ 1259.)

As defendant recognizes, our high court rejected his arguments in *Gammage*, *supra*, 2 Cal.4th 693. In *Gammage*, the California Supreme Court considered almost identical instructions and rejected the arguments defendant now makes. Specifically, the Supreme Court rejected the argument that the challenged instructions dilute the reasonable doubt standard. (*Id.* at p. 701.) The *Gammage* court also rejected the argument that the combination of instructions "create a preferential credibility standard for the complaining witness, or somehow suggest that that witness is entitled to a special deference." (*Ibid.*) The high court explained: "The one instruction merely suggests careful review when a fact depends on the testimony of one witness. The other tells the jury there is no legal corroboration requirement. Neither eviscerates or modifies the other." (*Ibid.*) Our high court expressly held that "it is proper" for the trial court to give the two instructions together in cases involving sex offenses. (*Id.* at p. 702.)

Notwithstanding defendant's argument that *Gammage* is wrongly decided, we are required to follow our Supreme Court. (*Auto Equity Sales*, *supra*, 57 Cal.2d at p. 455.) Defendant demonstrates no instructional error.

2. The Trial Court Erroneously Concluded That Consecutive Sentences Were Mandatory

With respect to both counts of lewd conduct with a child in violation of section 288, subdivision (a), the court sentenced defendant pursuant to section 667.61, known as the One Strike law. (See *People v. Acosta* (2002) 29 Cal.4th 105, 118 (*Acosta*).) The One Strike law is not a sentence enhancement because it does not add an additional term of imprisonment to the base term. (*Ibid.*) Instead, it is an "*alternate* penalty" for certain enumerated sex crimes. (*Ibid.*) It is undisputed that the One Strike law applies because jurors convicted defendant of lewd act with a child, a crime listed in section 667.61, subdivision (c)(8). (See also *People v. Murphy* (1998) 65 Cal.App.4th 35, 40–41.)

Defendant argues that the trial court was not required to impose consecutive sentences, and the case should be remanded for resentencing. We agree.

Consecutive sentences were not mandatory. Section 667.61, subdivision (i) governs consecutive sentences and does not mandate consecutive sentences for a violation of section 288, subdivision (a), the crime for which the trial court sentenced defendant consecutively.[4] (§ 667.61, subd. (i);

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[4] Section 667.61, subdivision (i) provides: "For any offense specified in paragraphs (1) to (7), inclusive, of subdivision (c), or in paragraphs (1) to (6), inclusive, of subdivision (n), the court shall impose a consecutive sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6." Defendant was not convicted of a crime specified in paragraphs (1) through (7) of section 667.61, subdivision (i).

People v. Valdez (2011) 193 Cal.App.4th 1515, 1524 [section 667.61, subdivision (i) mandatory sentences excludes reference to section 288, subdivision (a)].) Violation of section 288, subdivision (a) is not included in section 667.6, which governs consecutive sentences for other sex crimes.

To assist on remand, we note that defendant incorrectly argues that the trial court was precluded from relying on the existence of separate victims to support the imposition of consecutive sentences. The alternate penalty scheme in section 667.61 would have permitted the trial court to sentence defendant consecutively based on the separate victims. (Cf. *People v. Jenkins* (1995) 10 Cal.4th 234, 252, fn. 10 [dual use prohibition not applicable to alternate sentencing scheme under section 667.7 regarding habitual offenders and felonies involving great bodily injury].) California Rules of Court, rule 4.425(b)(2) upon which defendant relies, applies to the dual use of facts to impose both an upper term determinate sentence and an enhancement, circumstances not present here. Nevertheless, the record suggests the trial court did not recognize the full extent of its sentencing discretion, and therefore we remand so that it may exercise that discretion. (See *People v. Downey* (2000) 82 Cal.App.4th 899, 912 ["Where, as here, a sentence choice is based on an erroneous understanding of the law, the matter must be remanded for an informed determination."].)

DISPOSITION

The judgment is affirmed. Upon remand, the trial court shall exercise its discretion whether to impose consecutive or concurrent sentences on the two counts of lewd act upon a child. If the court imposes concurrent sentences, the court shall amend the abstract of judgment, and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.